

REMARKS

Background

Applicants and applicants' attorney express appreciation to the Examiner for the courtesies extended during the recent telephonic interview held on October 25, 2007. The present Amendment is submitted to address issues that were raised by the Examiner during the telephonic interview and to address the Examiner's rejections that were raised in the pending Office Action. Reconsideration and allowance for the above-identified application are now respectfully requested.

Claims 13-19, 21, and 22 have been previously withdrawn. Claims 1-12, 20, and 23 are pending in the application for consideration. Claims 1, 7, and 23 are currently amended and claims 24-29 are newly added. Claims 1-12, 20, 23-29 are pending for consideration.

I. Non-Compliant Amendment

The supplemental amendment filed on January 9, 2008 was not entered because claim 2 was listed as "Currently Amended" without indicating which portions were amended. This was in error. Claim 2 was not amended in the supplemental amendment filed on January 9, 2008 and the status identifier should have read "Original." The error is corrected by this amendment.

II. Numerical Ranges for Powdered Luo Han Guo

Pursuant the Examiner's request made during the interview, numerical ranges have been added to more specifically define an effective amount of powdered Luo Han Guo needed to mask the unpleasant flavor of noni juice. Support for the amendments to claims 1, 7, and 23 and new claims 24-29 can be found in the Examples section and in the as-filed claims. In particular, Examples 5 and 6 and claim 2 show that dried Luo Han Guo can be added to the dietary supplement of the present invention in an amount that ranges from about 0 wt% to about 3 wt%.

III. U.S. Pat. No. 5,433,965 to Fischer et al.

During the telephonic interview on October 24, 2007 an issue was raised with regards the language of Fischer et al., column 4, lines 20-40. The Examiner raised an issue as to whether Fischer et al. discuss the use of powdered Luo Han Guo. Specifically, Examiner pointed to lines

38-40 that recite "[t]hese as [sic] sweet juices can be concentrated but are mostly used as single strength juice or as dried powders." Column 4, lines 20-40 define the meanings of "sweet juice," "puree or serum," and "sweet juice concentrate" as "the puree or serum or juice from any fruit from the plant of the family Cucurbitaceae . . . with particular reference to making a Luo Han Guo sweet juice or concentrated juice, puree or serum . . . useful in this invention."

Based on this context, Applicants respectfully suggest that it is clear that when Fischer et al. use the term "dried powders" they are not discussing powdered Luo Han Guo made from whole fruit. Fischer et al. are instead discussing a dried sweet juice that is extracted according to the invention that is disclosed in the Fischer et al. application. As Applicants have suggested more fully elsewhere, the sweet juice of Fischer et al. is a highly extracted and purified form of Luo Han Guo that is, in the words of Fischer et al., "essentially free of the vegetable flavor and the bitter, astringent, brown flavor of the extracts of the dried" Luo Han Guo. Fischer, column 2, lines 13-15. Applicants respectfully suggest that Fischer et al. are advocating the use of a dried form of the sweet juice extract that they teach elsewhere in their application and not the use of unrefined, dried Luo Han Guo as taught in the present application.

Applicants also respectfully suggest that that it is clear that Fischer et al. are not advocating using the powder made from dried Luo Han Guo when they refer to "dry powders" in column 4, lines 39-40. That is, Fischer et al.'s whole application is essentially about how dried Luo Han Guo is undesirable and that their purified extract is superior. For example, see column 1, lines 53-59 wherein the applications states that dried Luo Han Guo has "bitter, astringent, and brown flavors" that make it undesirable for all but the "preparation of dilute teas and soups and products to which sugar, honey and the like are added."

IV. Rejections Under 35 U.S.C. § 103

The Office Action has rejected claims 1-12, 20, and 23 under 35 U.S.C. § 103(b) as being unpatentable over Su et al. (U.S. Appl. No. 2002/0068102) in view of Fischer et al. (U.S. Pat. No. 5,433,965) or Downton et al. (U.S. Pat. No. 5,411,755) or over Yegorova et al. (U.S. 6,387,370) in view of Fischer et al. (U.S. 5,433,965 or Downton et al. (U.S. 5,411,755). In this response, claim amendments and clarifying remarks are presented to address the Examiner's concerns.

Based on the amendments and remarks presented herein, Applicants believe that the

claims are in position for immediate allowance. Applicants respectfully propose that this is so because the cited references neither teach nor suggest a dietary supplement comprising noni juice and a powder made from dried Luo Han Guo, nor do the cited references teach or suggest a method for masking the unpleasant flavor of noni by combining noni juice with powdered Luo Han Guo extract. Moreover, the cited references neither teach nor suggest a dietary supplement that combines noni and powdered Luo Han Guo in the weight ranges recited in the claims. And while Fischer and Downton do teach a flavorless sweetener made from Luo Han Guo, both references teach away from the use of powders made from dried Luo Han Guo.

A. The Cited References Neither Teach Nor Suggest Each and Every Limitation of the Claims

Applicants respectfully assert that the cited references do not render the claims of the present application obvious because the references neither teach nor suggest each and every limitation of the claims. For example, claim 1 recites "[a] dietary supplement comprising: noni fruit; Luo Han Guo powder in a range from about 0.001 percent to about 3 percent by weight of the dietary supplement to mask flavor and/or scent of the noni fruit; Luo Han Guo liquid extract; and water." Independent claims 20 and 23 include similar language.

Applicants respectfully suggest that the cited references neither teach nor suggest a dietary supplement that combines noni and powdered Luo Han Guo. Additionally, the cited references neither teach nor suggest the use of powdered Luo Han Guo in the ranges recited in independent claims 1, 20, and 23. In fact, the cited references disclose no ranges in which powdered Luo Han Guo may be used in a dietary supplement containing noni. Moreover, the BPAI has recently stated that "[o]ptimization ... in a given range is generally obvious only when it is reasonably expected that an improvement will arise in that range." *Ex parte Atkinson and Benedict*, BPAI Appeal No. 2007-3900 (December 18, 2007) (emphasis in the original). Applicants respectfully suggest that an improvement would not be reasonably expected from the use of dried Luo Han Guo in the claimed ranges because, as will be discussed more fully below, the Fischer and Downton references teach away from the use of dried Luo Han Guo. For these reasons alone, the Applicants respectfully suggest that the claims of the present invention are not obvious in light of the cited references.

Applicants also respectfully traverse the suggestion that liquid and powdered extracts of

Luo Han Guo are the same ingredient. See, Office Action, pg. 17. Because powdered and liquid Luo Han Guo are not the same ingredient, Applicants also respectfully suggest that the ranges disclosed for use of liquid extract of Luo Han Guo disclosed in Fischer (col. 10, lines 27-36) do not read on the ranges for use of dried Luo Han Guo that are recited in the claims of the present invention. See, Office Action, pg. 6.

While powdered and liquid Luo Han Guo come from the same source, Applicants respectfully suggest that the Examiner's assertion that they are the same ingredient is akin to suggesting that corn meal and high-fructose corn syrup are the same ingredient because they are both derived from corn. And just as corn meal and high-fructose corn syrup are generally recognized as being different ingredients, powdered Luo Han Guo made from whole dried fruit and liquid Luo Han Guo are different because they have different properties and flavor characteristics. That is, one cannot be substituted for the other and they impart different characteristics to substances with which they are combined.

Furthermore, the plain teachings of Fischer and Downton make it clear that powdered and liquid extract of Luo Han Guo are regarded as being different ingredients by persons having ordinary skill in the art. For example, Fischer and Downton state that the purified, sweet extract of Luo Han Guo that they teach is essentially flavorless and that it imparts a sweet flavor "without off-flavors." Fischer, col. 2, line 62. In contrast, according to Fischer and Downton, powdered Luo Han Guo is characterized by vegetable and/or bitter, astringent, and brown flavors. See, e.g., Fischer, col 1, lines 55-56.

Moreover, Applicants respectfully traverse the suggestion that the use of powdered Luo Han Guo to mask the flavor of noni is inherent in the teachings of the cited references. See, Office Action, pg. 17. Fischer and Downton teach a highly purified, sweet extract of Luo Han Guo that is flavorless and "essentially free of the vegetable flavor and the bitter, astringent, brown flavor of the extract of [dried Luo Han Guo]." Fischer col. 2, lines 13-15. In contrast, powdered Luo Han Guo maintains a rich, deep flavor that is often described "bitter" that allows the dried powder and only the dried powder to mask the unpleasant flavor of noni. Application, paragraph [0032]. As such, Applicants respectfully suggest that removing the vegetable flavor and the bitter, astringent, brown flavor produces a Luo Han Guo extract that is merely sweet and that is incapable of masking the flavor of anything. That is, powdered Luo Han Guo possesses properties that are not in any way inherent in liquid Luo Han Guo.

B. The Cited References Teach Away From the Use of Powdered Luo Han Guo

Applicants respectfully assert that Fischer and Downton do not render obvious the use of powdered Luo Han Guo in the recited ranges to mask the flavor of noni because Fischer and Downton both teach away from the use of powdered Luo Han Guo extract. The MPEP clearly states that cited art "must be considered in its entirety, including disclosures that teach away from the claims." MPEP § 2141.02 VI. Applicants respectfully suggest that Fischer and Downton teach away from the use of powdered Luo Han Guo as recognized under applicable law because they repeatedly "criticize, discredit, or otherwise discourage" the use of and/or the properties of powdered Luo Han Guo. See, *Id.* (citing *In re Fulton*, 391 F.3d 1195, 1201, 73 USPQ2d 1141, 1146 (Fed. Cir. 2004)).

For example, Fischer and Downton specifically state that the drying process that occurs prior to powdering "causes the formation of bitter, astringent, and brown flavors." (Fischer, Col. 1, lines 53-59; Downton, Col. 1, lines 63-68). Furthermore, Fischer and Downton state that there are "unattractive" flavors inherent in a powdered extract of Luo Han Guo (see, e.g., Fischer, col. 2, lines 13-15, and col. 2, lines 36-38). Describing powdered Luo Han Guo with words such as "bitter," "astringent," and "unattractive" constitutes clear criticism of the properties of powdered Luo Han Guo. As such, a person having ordinary skill in the art would be discouraged from using powdered Luo Han Guo based on the teachings of Fischer and Downton. That is, a person having ordinary skill in the art would not be motivated to combine noni with powdered Luo Han Guo in the recited ranges because Fischer and Downton "criticize, discredit, or otherwise discourage" the use of powdered Luo Han Guo when they refer to its "bitter," "astringent," and "unattractive" flavors.

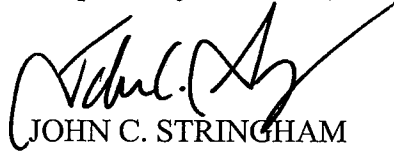
Conclusion

Based on the foregoing amendments and remarks, Applicants respectfully request reconsideration of the application and allowance of presently pending claims.

In the event the Examiner finds any remaining impediment to the prompt allowance of this application which could be clarified by a telephone interview, the Examiner is respectfully requested to contact the undersigned attorney.

Dated this 3rd day of April, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John C. Stringham", with a large, sweeping flourish extending to the right.

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